IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 9 OF 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT - Appellant(s)
Versus
SMT. ANKUNVERBA WD/OF FATESINH PARMAR - Respondent(s)

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Appearance :
MR. DIPEN DESAI, AGP for Appellant(s).
MR. KISHOR M. PAUL for Respondent.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 21/09/2006

ORAL JUDGMENT

The parties are heard.

2. The State, being aggrieved by the Judgement and Decree dated 5th May, 2003, passed in Civil Regular Appeal

No.36 of 2000 by the learned Joint District Judge, 7th Fast Track Court at Rajkot, confirming the Judgement and Decree dated 8th December, 1998 passed by the learned Civil Judge (S.D.), Rajkot in Regular Civil Suit No.33 of 1991, whereunder the plaintiff's suit has been decreed with a direction against the appellant-State for reinstating the original plaintiff with back-wages, has filed this appeal on various grounds.

3. The appeal has been admitted for hearing on 28th September, 2004 on the following substantial question of law:

> *"Whether it is competent for a Civil Court to entertain and adjudicate upon a dispute relating to service conditions of an employee of Health Department in the cadre of Dresser?"*

After hearing the learned Counsel for the parties, to some extent I expressed to the learned Counsel for the respondent that I propose to frame additional substantial question of law for deciding the Second Appeal.

With the consent of the parties, the second substantial question of law, as shown below, is also

framed:

> *Whether on the facts and in the circumstances of the case, the Courts below were justified in directing reinstatement with full back wages in view of the conduct exhibited by the respondent-plaintiff in remaining absent from services for almost about six and half years out of total tenure of twelve years?*

4. The facts in short are that the original plaintiff, Rajendrasinh Fatehsinhji Parmar, was appointed as a Dresser in the Government Police Dispensary on compassionate ground. He was appointed on 14th March, 1972 and joined the services on 15th March, 1972. It appears that in the beginning, he discharged his duties with utmost devotion and sincerity, but, later on he started avoiding the duty and on various occasions, he remained absent. The State Government produced complete records relating to the absence of the plaintiff. According to them, for the period from 3rd April, 1974 to 30th September, 1984, the absence was for 2117 days only. The plaintiff filed the suit submitting, *inter alia*, that as his termination was illegal, without any opportunity of hearing, without observing the principles of natural

justice or without an inquiry, the order terminating his services was bad and deserved to be quashed.

4.1 The State appeared before the learned trial Court and submitted in detail that in what manner the plaintiff came to be appointed and for how many days, he remained absent. It was also pleaded that various notices were issued to the plaintiff, he came to join the services on 1st October, 1984, but in view of his long absence, he was required to report to the Civil Surgeon; unfortunately, he did not report to anybody and virtually, abandoned the services. They also submitted that after finding that the plaintiff was incorrigible and was not interested in continuing with the services, they terminated the services. They submitted that as the plaintiff had abandoned the services, it was a simple declaration that he was no more in services.

4.2 After recording the evidence and hearing the parties, the learned trial Court decreed the suit, it held that the order of termination was illegal and the plaintiff would be entitled to a decree for reinstatement with full back-wages from the date of his termination.

4.3 At the instance of the State Government as the

appeal proved futile, they have filed the present appeal.

5. Shri Desai, learned Counsel for the appellant, submits that in view of the Gujarat Civil Services Tribunal Act, the Civil Court would have no jurisdiction to entertain the suit of the present nature. According to him, the suit was not maintainable before the Civil Court and as the matter was contested before the *coram non judice*, the decree deserves to be set aside.

6. Shri Paul, learned Counsel for the respondent, on the other hand, submitted that the question relating to applicability of the Gujarat Civil Services Tribunal Act, was never raised before the trial Court. It was never contended before the trial Court that the suit was beyond the jurisdiction of the Civil Court. Not only this, the question was even not raised before the first Appellate Court. He submits that the suit came to be filed in the year 1991 and after a long lapse of fifteen years, the State cannot be allowed to raise the question for the first time before the High Court.

7. In the opinion of this Court, the submission of Shri Paul must be accepted. The State Government was required and obliged to bring to the notice of the Court,

so also to the notice of the plaintiff, that the Civil Court would have no jurisdiction. They cannot be allowed to keep an ace up their sleeves and use it as a sword at the second appellate stage. If the objection was raised in the year 1991, the plaintiff could go to the Tribunal and raise all his grievances. It is also to be noted that during the pendency of this Second Appeal, the original plaintiff has died and now he has been substituted by his legal representative. Submission of such an argument from the side of the State and acceptance of the same by the Court would be too harsh and would be virtually penalising the plaintiff for none of his faults. If the objection raised by the State is allowed, then, it would be adding premium on the wrong committed by the State in not raising the objection.

8. The first question, in view of the discussion aforesaid, is decided against the interest of the State Government.

9. So far as the second question is concerned, it is submitted by Shri Desai, learned Assistant Government Pleader for the State, that looking to the conduct of the plaintiff, he would not be entitled to a direction for payment of the back-wages. His submission is that if a

person remained out of service, if a person proceeds on leave without any authority for almost about six and half years out of twelve years' tenure, then, his conduct would disentitle him for the back-wages.

10. Shri Paul, learned Counsel for the respondent, on the other hand, submits that present is a case of illegal termination and as the plaintiff had gone to join the services and he was not allowed and thereafter, he was terminated, present would be a case where the plaintiff would be entitled to full back-wages.

11. I have gone through the records. From the records, it would clearly appear that right from the year 1974, the plaintiff started remaining absent. He did not ask for leave and he did not even take permission of the Higher Officers. Every time when he remained absent, either his illegal absence was condoned by treating it to be leave without pay or treating it to be an absence. In ten years, in almost every year, he remained absent without any permission or authority. It is to be noted that right from 27th June, 1980 to 14th March, 1982, he remained absent for a continuous period of 607 days, for the period from 31st January, 1983 to 30th September, 1984, he remained absent for 609 days. If that was the conduct,

then, he would certainly not be entitled to full back-wages. It would be a different thing that had the Department taken appropriate steps, then, they could avail an opportunity to terminate the services by issuing proper notice and holding an inquiry. Unfortunately, the State did not do so and as the order of termination is being held to be illegal, the reinstatement cannot be challenged, but, the relief of full back-wages, in the opinion of this Court, cannot be allowed to stand.

12. Taking into consideration the totality of circumstances, I do hereby order that the plaintiff would be entitled to 25% of back-wages from the date of his termination to the date of decree and 100% back-wages from the date of the decree upto the date of his reinstatement. 100% back-wages are being awarded in favour of the plaintiff because at least from the date of the decree, the State could allow the plaintiff to join the services. Question No.2 framed by this Court to the extent indicated above is answered in favour of the plaintiff. The appeal stands partly allowed to the extent indicated above. Let the decree be framed accordingly.

13. I am told that the State Government has already made deposits before the High Court. If that be so, the

parties will submit their calculation in the Department and may withdraw their shares from the said deposits.

[R.S.Garg, J.]

*kamlesh**